NO. 44895-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VANESSA WHITFORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges on paper without public oversight.

Issue Pertaining to Assignment of Error

Jury selection was not open to the public because peremptory challenges were exercised silently on a piece of paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire in private, did the trial court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Vanessa Whitford with one count of first-degree robbery. CP 4. The jury found Whitford guilty, and the court imposed a standard range sentence of 129 months. CP 16, 48. Notice of appeal was timely filed. CP 41.

2. Substantive Facts

Walmart employees testified they watched on surveillance cameras as Whitford approached the "liquor wall," waited until no one was nearby, selected two bottles of tequila, walked to the baby aisle, and placed them in

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

her purse. 1RP[2] 43, 51-52, 104-06. From there, they testified, she selected two packages of socks, placed them in the purse as well, and left the store without stopping at the cash registers. 1RP 55-57. Once outside, employees testified they confronted Whitford, but she pulled out a knife. 1RP 110-11, 157. Whitford drove away and was arrested several days later. 1RP 116, 160, 173-74, 183-84.

During jury selection, the court and the attorneys for each side questioned the potential jurors in open court. 2RP 8-83. At the end of the questioning, the court announced:

> Ladies and gentlemen, at this time the two lawyers will be exercising those peremptory challenges I told you about. If you have a piece of reading material or you'd like to speak softly to your neighbor – of course, not about the case – you may do so. I do need you to stay seated and let's make sure those yellow tabs are way up high so it will be easier for th lawyers to remember. So you can read whatever you would like and/or pull out your computer, if you've got it in your lap, but you have to stay seated.

2RP 83-84. The record indicates "(attorneys picking jury)." 2RP 84. After this interlude, the court announced which jurors had been selected. 2RP 84-85. The court file contains a document entitled "Peremptory Challenges." in which each side's challenges are listed with name and

[2] There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 9, 2013, May 13, 2013, May 15, 2013, May 17, 2013; 2RP – May 9, 2013 (voir dire only).

juror number, in different handwriting for the plaintiff and the defendant. CP 59.

C. ARGUMENT

THE TRIAL COURT VIOLATED WHITFORD'S RIGHT TO A PUBLIC TRIAL BY HOLDING PEREMPTORY CHALLENGES IN PRIVATE.

The public trial right is an "essential cog in the constitutional design of fair trial safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); U.S. Const. amend. VI;[3] Const. art. I, § 10; Const. Art. I, § 22. Court proceedings may not be closed to public view without consideration, on the record, of the factors discussed in Bone-Club. 128 Wn.2d at 258-59. When the court fails to abide by this procedure, trial closure is structural error requiring reversal. State v. Wise, 176 Wn.2d 1, 13-15, 288 P.3d 1113, 1118 (2012).

Jury selection is a critical part of the trial that must be open to the public. Id. at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington's first

[3] Washington's Constitution provides at least as much protection of a defendant's fair trial rights as the Sixth Amendment. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113, 1117 (2012) (quoting Bone-Club, 128 Wn.2d at 260).

territorial legislature over 150 years ago). This should be the end of the inquiry. Courts may not exempt a proceeding from public view by closing the courtroom. Nor may they achieve the same effect by conducting the proceedings silently on paper. Whitford's conviction must be reversed because the private exercise of peremptory challenges violated her constitutional right to a public trial.

However, to determine whether a specific portion of jury selection implicates the public trial right, this Court has applied the "experience and logic" test, adopted in State v. Sublett. State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012)). Under that test, the court analyzes two questions: (1) "'whether the place and process have historically been open to the press and general public,'" and (2) "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The public trial right applies to the exercise of peremptory challenges because the answer to both questions is "yes."

a. Peremptory Challenges Have Historically Been Open to the Public.

"[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process." Press-Enterprise, 464 U.S. at 505. In two recent cases, this Court has deemed the exercise of peremptory challenges to be an integral part of jury selection that has historically been open to the public. In Wilson, this Court held the public trial right was not implicated when the bailiff excused two jurors due to illness before voir dire began. 174 Wn. App. at 347. The Court drew a distinction between administrative removal of potential jurors before voir dire and more integral portions of jury selection, including peremptory challenges. Id. at 342-43.

The Court explained, "[B]oth the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, provided such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added). Similarly, a trial court may delegate hardship and administrative excusals to other staff, "provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. Wilson's public trial argument failed because he could not show "the

public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), this Court held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. As in Wilson, the Jones court referred to the exercise of peremptory challenges as a part of jury selection that must be public. Id. The court held the selection of alternate jurors must be public because it is akin to exercising peremptory challenges. Id. at 98 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

As Wilson and Jones suggest, the "experience" component of the Sublett test is satisfied in this case. The criminal rules of procedure show

our courts have historically treated peremptory challenges as part of voir dire on par with for-cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates voir dire as involving peremptory and for-cause challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel question prospective jurors to assess their ability to serve on the particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of potential jurors before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100 (1), but only so long as "such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

b. Public Access Plays a Significant Positive Role in Ensuring Fairness in the Exercise of Peremptory Challenges.

The "logic" component of the Sublett test is satisfied as well. While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 48-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). A prosecutor may not

challenge a juror based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

Racial discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Saintcalle, 178 Wn.2d at 41 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)). Despite the steps already taken to combat racial discrimination in jury selection, it remains "rampant." Saintcalle, 178 Wn.2d at 35. This discrimination can occur with insidious obviousness, or may, even more insidiously, seep into decision-making at a level far below that of conscious thought. Id. at 36, 46-49.

Public scrutiny can have a positive influence in preventing conscious or unconscious discrimination. The public trial right encompasses "'circumstances in which the public's mere presence passively contributes to the fairness of the proceedings by, for example deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.'" State v. Slert, 169 Wn. App. 766, 772, 282

P.3d 101 (2012), review granted, 176 Wn.2d 1031 (2013) (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)). An open peremptory process safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged.[4]

The exercise of peremptory challenges directly impacts the fairness of a trial, and it is inappropriate to shield that process from public scrutiny. Public trials are a check on the judicial system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Both experience and logic indicate that the exercise of peremptory challenges is a crucial part of a criminal trial that must be open to the public.

c. The Procedure Used in this Case Was Private.

The public trial right helps assure that trials are fair, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5. These purposes are only served if the proceedings

[4] But see State v. Love, ____ Wn. App. ____, 309 P.3d 1209, 1214 (2013) (exercise of peremptory challenges "presents no questions of public oversight.").

are actually observable by the public. Thus, it is unsurprising that courts have found this right was violated when proceedings were held in a location that is not accessible to the public, regardless of whether the courtroom itself was per se closed. See, e.g., State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (proceedings in chambers were closed); State v. Leyerle, 158 Wn. App. 474, 477, 483-484, 242 P.3d 921 (2010) (questioning juror in hallway outside courtroom was a closure).

This Court should reject any assertion that the procedure in this case was public. The procedure was akin to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (exercise of peremptory challenges in chambers violates defendant's right to a public trial).

The purpose of the process was apparently to ensure that jurors did not know which side had excused which juror. Yet jurors were allowed to remain in the courtroom, which demonstrates peremptory challenges were exercised in such a way that those in the courtroom would not be able to

overhear. 2RP 83-84. The public could not hear which potential jurors were peremptorily struck, who struck them, and in what order they were struck. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

This procedure was closed to the public just as if it had taken place in chambers. Members of the public are no more able to approach the bench or counsel table and listen to an intentionally private process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public was denied the opportunity to scrutinize events.

The selection process was closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App. 4th at 683 n.6.

d. The Conviction Must Be Reversed Because the Court Did Not Justify the Closure Under The Bone-Club Factors.

Conducting peremptory challenges in private and excluding the public from observing that process violated Whitford's right to a public trial. *Before* a trial judge closes the jury selection process off from the

public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[5]

There is no indication the court considered the Bone-Club factors before conducting the private jury selection in this case. Appellate courts do not comb through the record or attempt to deduce whether the trial court applied the Bone-Club factors when it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because peremptory challenges were not exercised openly and in public, Whitford's constitutional right to a public trial under the state and

[5] The Bone-Club requirements are similar to those set forth by the United States Supreme Court. In re Pers. Restraint of Orange, 152 Wn.2d 795, 805-06, 100 P.3d 291 (2004) (discussing Waller, 467 U.S. at 45–47).

federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Whitford's conviction must be reversed. Id. at 19.

This Court should reject any suggestion that this issue may have been waived. A defendant does not waive the right to challenge an improper closure by failing to object. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Whitford's public trial right before the peremptory challenges were exercised in secret. There is no waiver, and Whitford's conviction must be reversed.

D. CONCLUSION

Whitford requests this Court reverse her conviction because her right to a public trial was violated.

DATED this 27th day of November, 2013.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 44895-5-II
	)	
VANESSA WHITFORD,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VANESSA WHITFORD
DOC NO. 786241
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF NOVEMBER, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 22, 2013 - 3:17 PM

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